UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

NOLAN ENTERPRISES, INC., D/B/A
CENTERFOLD CLUB

and

Case No. 09-CA-220677

BRANDI CAMPBELL, AN INDIVIDUAL

RESPONDENT'S REPLY TO GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Respondent, Nolan Enterprises d/b/a Centerfold Club, by and through its undersigned counsel and pursuant to Section 102.24(c) of the Rules of the National Labor Relations Board ("the Board"), respectfully submits its following reply to Counsel for the General Counsel's opposition to its motion for summary judgment (hereinafter "Opposition"). Upon consideration of the relevant evidentiary materials properly before the Board and General Counsel's failure to advance anything beyond a conclusory statement as to why a hearing should be required, Respondent respectfully requests that summary judgment be granted in its favor and the claims and underlying charges dismissed.

ARGUMENT

Section 102.24 of the Board's Rules provides that summary judgment is appropriate if the record shows there is no genuine issue as to any material fact, and the moving party

is entitled to judgment as a matter of law. *Security Walls, LLC*, 361 NLRB No. 29, slip op. at 1 (2014); *Conoco Chemicals Co.*, 275 NLRB 39, 40 (1985). Section 10(b) of the National Labor Relations Act (the "Act") provides that summary judgment proceedings shall, so far as practicable, be conducted" in accord with the evidentiary rules applicable in federal court. As such, the Board may deny the motion for summary judgment if it fails to establish the absence of a genuine issue, or where the General Counsel's pleadings, opposition or response indicate that a genuine issue may exist.

On December 21, 2018, Respondent filed a Motion for Summary Judgment based on the absence of any genuine issue of material fact as to the Charging Party's employment status and for the lack of jurisdiction of the Board. Respondent submitted evidence including a sworn affidavit, as well as an analysis of the legal standard used to characterize an employer's relationship with its workers under federal law. Counsel for the General Counsel filed the Opposition in this matter on January 4, 2019. The Opposition states simply that the General Counsel disagrees with Respondent's position and that "the evidence to be adduced at trial will demonstrate ample support for the position that Campbell and other dancers at Respondent's facility are employees covered by the Act." General Counsel's Opposition fails to identify a single fact that is "disputed" or to offer any explanation as to why a hearing is required in this matter.

Although General Counsel is not required to produce affidavits or other documentary evidence under Section 102.24(b), an opposition to a motion for summary judgment must contain more than a bare statement that the General Counsel "disputes Respondent's contentions as they relate to . . . employment status." Opposition, p. 2. The Opposition clearly fails to establish that "General Counsel can prove any set of facts in

support of his claims that would entitle him to relief." *Detroit Newspapers,* 330 NLRB 524 at fn. 7 (2000). In *Trinity Technology Group, Inc.*, 364 NLRB No. 133, Board Chairman Phillip Miscimarra states in his concurrence with the Board Decision, "the absence of 'evidence' supporting the General Counsel's legal theory would be a reason that summary judgment should be granted, not denied."

Further, a boilerplate response asserting that a motion should be denied because the because General Counsel disagrees, without more, is wholly deficient. Opposition, p. 2; see also *Leukemia and Lymphoma Society,* 363 NLRB No. 124, slip op. at 2 (2016) (Member Miscimarra, dissenting) (calling out General Counsel for claiming that the "[m]otion simply highlights the factual and legal disputes that are framed by the pleadings and warrant a hearing before an administrative law judge . . . ." as deficient.). As NLRB Chairman Miscimarra has stated in numerous decisions, "[i]n response to a motion for summary judgment, I believe that the General Counsel at least must explain in reasonably concrete terms why a hearing is required. Under the standard that governs summary judgment determinations, this will normally require the General Counsel to identify material facts that are genuinely in dispute." *Albuquerque Health Servs., Inc. & William Hunter*, 28-CA-192313, 2017 WL 2963201, at *1 (2017) (citing *L'Hoist North America of Tennessee, Inc.,* 362 NLRB No. 110, slip op. at 3 (2015) (concurring).

In *Trinity*, Chairman Miscimarra's concurrence points out that "the General Counsel's opposition appears to presume that the Board will deny motions for summary judgment and conclude that a hearing is necessary merely because a respondent has denied liability, or merely because the General Counsel disagrees with the respondent's version of events." As referenced above, General Counsel in our present matter is

advancing the same argument. See Opposition, p. 2. General Counsel's claims that they do not intend to "squander the Board's time" addressing what it claims are "mischaracterizations of the underlying facts," or "otherwise recite for Respondent all of the facts that General Counsel has to support its complaint." Opposition, p. 2. In *L'Hoist North America of Tennessee, Inc.*, the Board rejected these statements, as follows:

> Although the General Counsel asserts that the Respondent's motion contains "many mischaracterizations" of "underlying facts," it does not "squander the Board's time" for the general Counsel to state with reasonable specificity *what* "mischaracterizations" of "underlying facts' the Respondent's motion contains. It is the Board's job to decide whether a pending motion for summary judgment has merit, and it requires *more* of the Board's time, not less, to assess the merits of a respondent's summary judgment motion when the General Counsel contents himself with conclusory assertions that summary judgment should be denied and refuses to make any reasonable effort to identify what genuine disputes as to material facts, if any, warrant a hearing. For similar reasons, it is deficient to state that "these matters are not properly before the Board at this time and are more appropriate for resolution by an administrative law judge." These matters *are* "properly before the Board" because they were raised in a motion for summary judgment. And stating that the case is "more appropriate for resolution by an administrative law judge" is nothing more than asserting that summary judgment should be denied without explaining *why* it should be denied. Similarly unpersuasive is the General Counsel's further assurance: "Suffice it to say the evidence to be adduced at trial will demonstrate that [the] Respondent engaged in the alleged conduct." When opposing a motion for summary judgment, I believe it does *not* "suffice" to promise that "evidence to be adduced at trial" will "demonstrate" that the complaint's allegations have merit. Otherwise, the Board would never have occasion to grant a respondent's motion for summary judgment because in *every* case in which the General Counsel has decided to issue a complaint, he believes he ought to prevail.

(Emphasis in original, internal citation omitted). 362 NLRB no. 110, slip op at 3 (2015).

CONCLUSION

In their Opposition to Respondent's Motion for Summary Judgment, General Counsel has advanced a deficient, boiler plate response that fails to establish that they can prove any set of facts in support of their claims. With no genuine issue of material fact regarding

the Charging Party's employment status, and because the Board does not have jurisdiction over this matter, it should promptly dismiss this matter and the underlying charges.

Respectfully submitted,

/s/ Christina L. Corl
Christina L. Corl (0067869)
PLUNKETT COONEY
300 East Broad Street, Suite 590
Columbus, Ohio 43215
Tel: (614) 629-3018
Fax: (614) 629-3019
Email: ccorl@plunkettcooney.com
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2019, I sent a copy of the foregoing Motion for Summary Judgment via electronic mail, to the NLRB attorney assigned to the matter, Zuzana Murarova, and to Brandi Campbell.

/s/ Christina L. Corl
Christina L. Corl (0067869)

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